

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TERRANCE JON IRBY,  
Petitioner,  
  
vs.  
  
CAROLYN MUNDEN and ELDON  
VAIL,  
  
Respondents.

NO. CV-09-5077-CI

REPORT AND RECOMMENDATION TO DENY  
WRIT OF MANDAMUS AND DENY *IN FORMA  
PAUPERIS* STATUS

By letter received September 11, 2009, Petitioner Terrance Jon Irby advised the court he was "doing this Writ because it does not cost as much time and money as would an 42 U.S.C. 1983 Lawsuit." It appears the Ninth Circuit Court of Appeals had instructed Mr. Irby he could file a motion for injunctive relief in a new action in the district court.

The writ of mandamus in civil actions in the federal district courts, however, is abolished pursuant to Fed. R. Civ. P. 81(b); *Finley v. Chandler*, 377 F.2d 548 (9th Cir. 1967). Relief in the nature of mandamus is confined to situations where it is in necessary aid of the court's jurisdiction. *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109, 110, 27 S.Ct. 24, 51 L.Ed. 111 (1906). Federal mandamus applies to officers, employees, and agencies of the United States. It does not apply to officers, employees, and agencies of

1 states. 28 U.S.C. § 1361; *See Moye v. Clerk, DeKalb County Superior*  
2 *Court*, 474 F.2d 1275 (5th Cir. 1973); *Anderson v. Beto*, 469 F.2d 1076  
3 (5th Cir. 1972) ("federal courts have no general power to direct state  
4 courts and their judicial officers in the performance of their duties  
5 where mandamus is the only relief sought"). As a result, this court  
6 does not have jurisdiction to entertain petitioner's claims and may  
7 not issue a writ of mandamus in this matter.

8 In any event, under section 1361 a writ of mandamus may issue  
9 only if (1) the petitioner's "claim is clear and certain; (2) the  
10 official's duty is 'ministerial and so plainly prescribed as to be  
11 free from doubt'; and (3) no other adequate remedy is available."  
12 *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986) (*quoting Tagupa*  
13 *v. East-West Center, Inc.*, 642 F.2d 1127, 1129 (9th Cir. 1981)).  
14 Assuming arguendo these standards also apply to a writ in the nature  
15 of mandamus, Petitioner has failed to state a claim which is "clear  
16 and certain."

17 It is unclear on what basis Mr. Irby would be entitled to relief  
18 should he file a complaint pursuant to 42 U.S.C. § 1983. There is no  
19 authority under 28 U.S.C. § 1915(b) to either direct a certain order  
20 in which deductions will be made from an inmate account, or to refund  
21 filing fees a prisoner has chosen to incur by pursuing litigation in  
22 the federal district and appellate courts. Accordingly, **IT IS**  
23 **RECOMMENDED** Mr. Irby's Writ of Mandamus be **DENIED** and the application

1 to proceed *in forma pauperis*,<sup>1</sup> be DENIED.

## OBJECTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report within ten (10) days following service with a copy thereof. Such party shall file written objections with the Clerk of the Court and serve objections on all parties, specifically identifying the portions to which objection is being made, and the basis therefor. Any response to the objection shall be filed within ten (10) days after receipt of the objection. Attention is directed to FED. R. CIV. P. 6(d), which adds additional time after certain kinds of service.

A district judge will make a de novo determination of those portions to which objection is made and may accept, reject, or modify the magistrate judge's determination. The judge need not conduct a new hearing or hear arguments and may consider the magistrate judge's record and make an independent determination thereon. The judge may, but is not required to, accept or consider additional evidence, or may recommit the matter to the magistrate judge with instructions. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 72; LMR 4, Local Rules for the Eastern District of Washington.

A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be

<sup>25</sup> The court notes Mr. Irby's *in forma pauperis* application (Ct.  
<sup>26</sup> Rec. 7) combines of several forms but did not contain sufficient facts  
<sup>27</sup> regarding his assets.

1 appealed.

2 The District Court Executive is directed to enter this Report and  
3 Recommendation and forward a copy to Petitioner.

4 DATED November 3, 2009.

5  
6 S/ CYNTHIA IMBROGNO  
7 UNITED STATES MAGISTRATE JUDGE  
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